PUBLIC PROSECUTOR

v.

AHMAD HUSEIN & ANOR.

HIGH COURT MALAYA, KOTA BHARU
IDRIS YUSOFF J
[CRIMINAL TRIAL NO. 47(58)-1-86]
7 NOVEMBER 1989

CRIMINAL PROCEDURE: *Goods found in between Malaysia and Thailand - Treaty - Interpretation of thalweg line - Change in river boundary - Lack of clear evidence from prosecution on position of accused when arrested.*

Both accused were jointly charged with an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952. The alleged substances were found in a sampan which was coming from Takbai, Thailand. There was no dispute that the 1st accused had custody and control of the bag; however the issue for determination was whether the alleged offence was committed within the Malaysian jurisdiction, on the interpretation of the treaty signed between Great Britain and Siam on 10 March 1909. A survey of the estuary was done to ascertain the thalweg line as defined in the treaty nautical charts. There was also argument as to the definition of thalweg.

Held:

[1] After having heard the evidence and after perusing the relevant documents the Court was of the opinion that the word "thalweg" in the 1909 treaty was intended to mean the deepest part of the river.

[2] It is a fact that "river boundary" was a moving boundary and that the depth of the river changes from time to time depending on various factors. The survey that was carried out by PW7 was done 34 months after the offence; in the absence of clear evidence that the thalweg line was slowly moving towards Malaysia in 1983 it could not be inferred that the thalweg line had moved closer to Malaysia.

[3] The length of the jetty was very crucial as it showed the position of the sampan when it was signalled by the police to come alongside the police boat; the conflicting evidence of PW3 and PW7 as to the length of the jetty and the failure of the prosecution evidence to clearly identify the jetty, to mark the course taken by PW4 from Takbai and his position when he was signalled by the two police constables to come alongside the boat created uncertainty or doubt as to whether the alleged offence was committed within Malaysian jurisdiction.

[Both accused acquitted and discharged.]

Legislation referred to:
Dangerous Drugs Act 1952, ss. 37(d),(da)(vi), 39B(1)(a), 39B(2)

For the 1st accused - Mat Zaidan bin Ali (engaged); M/s. Adhan, Hussin & Zaidan
For the 2nd accused - Naim bin Datuk Hj. Ishak (assigned); M/s. Naim & Co.

JUDGMENT

Idris Yusoff J:

The charge against both accused persons as finally amended was as follows:

> That you jointly on 10 September 1985, at about 7.20p.m., at about 150 yards from Pengkalan Kubur in the District of Tumpat, in the State of Kelantan, did on your own behalf traffic in dangerous drugs, to wit; 608.92 grammes of cannabis, and you have thereby committed an offence under s. 39B(1)(a), punishable under s. 39B(2) of the Dangerous Drugs Act 1952.

At the close of the case for prosecution I acquitted and discharged both accused as I was not satisfied that the alleged offence was committed on the Malaysian side of the river i.e., within our local jurisdiction.

Apart from the question of jurisdiction the acquittal of the 2nd accused was also due to lack of incriminatory evidence adduced against him and perhaps it was for this reason that the Public Prosecutor only preferred an appeal against the acquittal of the 1st accused.

The evidence as led by the prosecution showed that on the day and time of the alleged offence PW3, Sgt. Major Sawaluddin bin Idris was in command of a police marine boat PA 47 which boat was moored at Jetty Heng, Pengkalan Kubur, Tumpat. Together with PW3 were seven other police personnel. The said police boat was there on its routine patrol duties and had been at the jetty since 5.30p.m. that day. At the material time PW3 who was seated in a wheel house saw a sampan coming from Takbai towards Malaysian side. He claimed that when the sampan was about 25 yards away and was about to pass his boat he sounded the siren intermittently for about one minute. At the same time he also instructed PC Ahmad Zaidi and PC Ab. Latif to signal the sampan to come towards them. When the sampan came alongside his boat PW3 instructed both PC Ahmad Zaidi and PC Ab. Latif to get into the sampan to carry out a check. In the sampan were the taikong PW4 Mohd. Nasir bin Sahak, the two accused and Daud bin Mek Ngah who was the taikong's assistant. On checking the boat PC Ahmad Zaidi found a chocolate coloured bag with the label "Pen Bird" (P14) placed between the legs of 1st accused. PC Ahmad Zaidi unzipped the bag and found a white plastic bag in it. On seeing this PW3 himself got into the sampan for the purpose of carrying out further check. In the presence of the two police constables and the four persons PW3 took out the plastic bag (P15) from the bag (P14) and on opening P15 found a package wrapped in a Chinese newspaper (P16). On opening P16 he found another wrapper - a brown paper wrapper (P17) in which were dried leaves believed to be ganja. The dried leaves were tied in a bundle with raffia string and together with the bundle was a packet wrapped in a Chinese newspaper (P9). Inside P9 were also dried leaves suspected to be ganja. Other contents of the bag (P14) were a wallet in which was found the result slip of SPM Examination 1976 in the name of Ahmad bin Husein, a Safety Orientation Pass also in the name of Ahmad bin Husein, an International Passport issued to Ahmad bin Husein and a few other personal items.

All the four persons in the boat were arrested and taken to Pengkalan Kubur Police Station in another police boat where a police report was lodged. At about 8.50p.m. the same evening ASP Hamzah bin Haji Awang (PW5) came to Pengkalan Kubur Police Station to take over the investigation. The four persons together with all the exhibits were handed to him.

Mohd. Nasir bin Sahak (PW4) was called to give evidence for the prosecution. He admitted that both accused were passengers of his boat who wanted him to ferry them across the river to Pengkalan Kubur on the Malaysian side. He said as he was heading for Pengkalan

Mak Su Mek which was in Pengkalan Kubur he saw a signal from the police marine boat directing him to take his sampan alongside the police boat. He said he was about 150 yards from the bank of Pengkalan Mak Su Mek when he saw the signal. The brown bag (P14) was on the lap of the 1st accused.

He also said he was about 100 yards from the police boat when he saw the signal but he was definite that no siren had ever been sounded by the police. He said before the four of them got on the police boat no police personnel went down into the sampan. As instructed by the police he went to Pengkalan Kubur Police Station together with Daud in his sampan. He maintained that both accused were taken to the wheel house while he and Daud remained on deck. He could not see what was happening in the wheel house but however was definite that it was the 1st accused who handed the bag to the police. All the dried leaves found in the bag were sent to the department of chemistry for examination which was carried out by Encik Mohan a/l Gangadharan (PW2). The witness confirmed that after carrying out the normal tests those leaves were cannabis as defined in s. 2 of the Dangerous Drugs Act 1952 as amended. The total net weight was 608.92 grammes.

On the evidence of those witnesses I found as a fact that at the material time the 1st accused was in custody and control of the bag which contained cannabis with the net weight of 608.92 grammes and would therefore attract the presumptions under s. 37(d) and (da)(vi). The 1st accused was therefore presumed to be trafficking in dangerous drugs. It would also be worth mentioning that Encik Zaidan, Counsel for the 1st accused, in the course of his submission conceded that the 1st accused had the custody and control of the bag, and since he did not seriously challenge the manner in which the tests were carried out and the net weight as found by the chemist the finding of the Court and the invocation of the presumptions were therefore amply justified.

However, there was one issue which was very crucial that called for determination - i.e., the question of jurisdiction. It was strongly contended for the 1st accused that there was a doubt as to whether the alleged offence was committed within our local jurisdiction. He claimed that the evidence of prosecution witnesses fell short of certainty that the offence was committed within our jurisdiction and since there existed a doubt such doubt must be resolved in favour of the defence.

To discharge the burden of proving this point, the prosecution had to rely on a treaty signed between Great Britain and Siam in Bangkok on 10 March 1909. Reproduced below, the material and relevant portion of the treaty:

> Boundary Protocol annexed to the treaty dated 10 March 1909.
>
> The frontiers between the territories of His Majesty the King of Siam and the territory over which his suzerain rights have by the present treaty been transferred to His Majesty the King of Great Britain and Ireland are as follows:
>
> Commencing from the most seaward point of the northern bank of the estuary of the Perlis River and thence north to the range of hills which is the watershed between the Perlis River on the one side and the Pujoh River on the other; then following the watershed formed by the said range of hills until it reaches the main watershed or dividing line between those rivers which flow into the Gulf of Siam on the one side and into the Indian Ocean on the other; following this main watershed so as to pass the sources of the Sungei Patani, Sungei Telubin, and Sungei Perak, to a point which is the source of the Sungei Pergau; then leaving the main watershed and going along the watershed separating the waters of the Sungei Pergau from the Sungei Telubin, to the hill called Bukit Jeli or the source of the main stream of the Sungei Golok.

Thence the frontier follows the thalweg of the main stream of the Sungei Golok to the sea at a place called Kuala Tabar. (Emphasis supplied).

Encik Nordin bin Abdul Wahab (PW7), Bentara Kanan Hydrografi (chief petty officer) of Jabatan Arah Hydrografi, Ministry of Defence, Kuala Lumpur was instructed by Lt. Commander Zainal Abidin bin Soot (PW8) to carry out a survey of the estuary of Sungei Golok on 8 July 1988 following a request from ASP Hamzah (PW5). PW7's role was to determine the depth of the river so that a thalweg line could be ascertained. He informed the Court that he used instruments called Sounding Sexton and Head Lead Line to take measurement of the depth of the river.

PW7 began the survey by firstly going to Takbai side in a motorboat. From there he proceeded towards Jetty Heng and when he was about 60 meters from Takbai he made a first sounding depth to ascertain the depth of the river at that point. This was obtained by lowering down the Head Lead Line to the bed of the river. To ascertain the position of the boat he took the bearing of one of the flag poles planted on either side of Jetty Heng by making use of two units of Sounding Sexton. This sounding depth was followed by four more sounding depths along the same imaginary line called sounding line extending from Takbai to Jetty Heng. Altogether PW7 made 16 sounding depths along three sounding lines.

Upon getting all these datas PW7 prepared P26, a fair sheet of the estuary of Sungei Golok which was subsequently passed on to PW8 Lt. Commander Zainal Abidin bin Soot for verification and confirmation.

As could be observed from P26, the first sounding line as shown in green was followed by the second in brown and the third in orange. The circles indicated the sounding depths. On the first sounding line there were five sounding depths and the measurements taken at the five sounding depths beginning from Takbai side were respectively 4.2 meters, 4.8 meters, 4.2 meters, 5.4 meters and 3.4 meters. For the second sounding line the respective measurements at the six sounding depths were 5 meters, 6.5 meters, 5.7 meters, 4.1 meters, 2.8 meters and 3.7 meters, while on the third sounding line the five sounding depths measured 4.4 meters, 4.4 meters, 3.5 meters, 4.2 meters and 1.8 meters respectively.

Based on those measurements the deepest part was the second sounding depth of the second sounding line (6.5 meters) followed by the 3rd sounding depth of second sounding line (5.7 meters) then the fourth sounding depth of the first sounding line (5.4 meters) and finally the first sounding depth of the second sounding line (5 meters). Witness also said that in preparing P26 he also used a fair sheet for 1983 (P27) as guidance.

Next there was the evidence of PW8 Lt. Commander Zainal Abidin bin Soot a Hydrography Surveyor attached to Jabatan Arah, Hydrografi, Kuala Lumpur as a Staff Officer Hydrography (Data). He informed the Court that his duties were amongst others, to examine, check and confirm all datas that were submitted to the division by surveying ships. With those datas it would enable the division to produce the nautical charts. He confirmed the instructions given to PW7 to make a survey of the estuary of Sungei Golok and also the preparation of P26 by PW7. He was the one who drew the blue line on P26 which line was known as thalweg line indicating the deepest part of the river. He also gave the distance from the third sounding depth of second sounding line to the nearest bank at Pengkalan Kubur as 245 meters while the distance from the fourth sounding depth of the first sounding line to the nearest bank at Pengkalan Kubur was 145 meters. He said judging from P26 there were nine sounding depths on Malaysian side and three on Thai side.

The prosecution also claimed that although it was not so defined the word "thalweg" appearing in the 1909 treaty was intended to mean the deepest part of the water channel (river). However Counsel for the 1st accused argued that since the word was not defined it was also capable of conveying some other meanings e.g., it might mean "the principal navigable channel" which need not be the deepest part of the river.

Evidence was also led to show that all along the understanding between Malaysia and Thailand of the word thalweg was the deepest part of the river. The minutes of the 12th Meeting of the Joint Malaysia-Thailand Land Boundary Committee was produced to support such was the understanding. For my part having heard the evidence and after perusing the relevant documents I was of the opinion and so did I hold that the word "thalweg" in the 1909 treaty was intended to mean the deepest part of the river.

Having so held and relying on Exhibit P26 could it be said that the offence as alleged was committed within our jurisdiction, not forgetting that the survey was carried out by PW7 on 8 July 1988 some 2 years 10 months later - more so when it was admitted by a prosecution witness that "river boundary" was a moving boundary and the depth of the river kept on changing from time to time depending on the extent of erosion, sedimentation etc. In fact those changes were noticeable when compared P26 with P27, which was drawn in 1983 - it showed a difference of about 30 meters. As testified by PW8 there was a change in the thalweg line between the fourth sounding depth of the first sounding line and the third sounding depth of the second sounding line. When compared P26 with P27 the thalweg line moved towards Thai side at the third sounding depth of the second sounding line but moved towards Malaysian side at the fourth sounding depth of the first sounding line. It may be argued in the circumstances that since the fourth sounding depth of the first sounding line was about 145 meters to the nearest bank at Pengkalan Kubur and that it had moved closer to the Malaysian side compared to when it was in 1983, the position in September 1985 could be the same if not further than in 1988. I must say I had also addressed myself to such a possibility but unfortunately I entertained some doubts that the position could be so since there was no evidence to show as from 1983 the thalweg line was slowly but definitely moving towards Malaysia. In the absence of any evidence to that effect, I felt that it was not safe for me to come up with such inference.

In the course of the trial the prosecution also put in the sketch plan (P13) drawn by the investigating officer ASP Hamzah. As the word suggested the plan was not only drawn not according to scale but appeared to be very misleading especially the length of Jetty Heng in relation to the width of the river. The length of the jetty was very crucial as it showed the position of the sampan when it was signalled by the two police constables to come alongside the police boat. PW3 said that the sampan was at the point marked 'X' in red in the sketch plan when he first sounded the siren and 'X' was about 100 yards from Pengkalan Kubur. However, PW7 said that Jetty Heng stretched about 52 meters from the river bank and the police boat would be about 52 meters or in any case not more than 60 yards from the bank.

I must say that the evidence of PW3 left much to be desired. I was skeptical of his evidence as a major portion of which appeared rather dubious when tested against the evidence of PW4 whose evidence I preferred to accept. I believe such was also the preference of the Deputy Public Prosecution when he amended the charge by substituting the words "about 150 yards from" for the words "Pengkalan Haram Ramli". The distance of 150 yards was given by PW4.

In the circumstances what better evidence could have been produced by the prosecution. To my mind it would have given a clearer picture if a prosecution witness was asked to identify Jetty Heng on P26 and PW4, be asked to mark the course taken by him from Takbai and also his position when he was signalled by the two police constables to come alongside the police boat. Perhaps the position shown may not be conclusive since the thalweg line on P26 was drawn some 2 years 10 months later but at least it would assist the Court to a certain extent, and perhaps with a little adjustment making provision for the time lapse the Court might be able to come to a finding. The failure of the prosecution to adduce such evidence had created uncertainty or doubt as to whether the alleged offence was committed within our jurisdiction - hence the order of acquittal and discharge.

Also found at [1990] 2 CLJ 1012